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No. 82-63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF REVERE,

Petitioner,

v.

MASSACHUSETTS GENERAL HOSPITAL,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Was Patrick M. Kivlin "inflicted" with "cruel and unusual punishment" under the Eighth Amendment by the mere refusal of the City of Revere to pay Massachusetts General Hospital for medical services it rendered to Kivlin for injuries he sustained while being apprehended by the police?

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center organized under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States, including Massachusetts, whose interests the Foundation represents.

More specifically, WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. WLF's concern for the physical, psychological and financial impact crime has on its victims, their families, and society has led to the Foundation's establishment of a Crime Vic-

tims Program. This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides legal guidance and assistance to the victims of violent crime, encourages victims to file civil suits for damages against their attackers,[1] participates in rule-making proceedings before the U.S. Parole Commission, and monitors those criminal cases in which the courts have been too lenient in sentencing violent criminals and otherwise have exhibited an insensitivity to the rights of victims and the law-abiding public.

In the instant case, WLF seeks to advance the interests of its members, the citizens of Massachusetts, and the public at large by urging this Court to reverse the court below. The Supreme Judicial Court for the Commonwealth of Massachusetts presently holds that municipalities have a constitutional duty arising under the Eighth Amendment to pay the medical expenses of felony suspects injured while being apprehended by the police. This novel decision ignores Eighth Amendment jurisprudential principles as enunciated by this Court and stands as an unwarranted judicial interference in an area best handled by elected states legislatures.

The Foundation has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Williams v. Zbaraz*, 448 U.S. 358 (1980); *Enmund v. Florida*, —— U.S. ——, 102 St.Ct. 3368 (1982); *Zant v. Stephens*, —— U.S. ——, 102 S.Ct. 1856 (1982); *Edwards v. United States*, 430 A.2d 1321 (D.C. Ct. App.), *cert. denied*, —— U.S. ——, 102 S.Ct. 1721 (1982); *Murphy v. Hunt*, —— U.S. ——, 102 S.Ct. 1181 (1982).

WLF can bring to this case a perspective not presently represented which may assist this Court in arriving at a

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[1] For example, WLF is representing the Secret Service agent shot by John W. Hinckley, Jr. in a civil suit for compensatory and punitive damages. *McCarthy v. Hinckley*, No. 82-0866 (D.D.C. filed March 29, 1982).

full consideration of all the public interest issues. The present parties to this controversy are primarily concerned with the end results of this lawsuit, *i.e.*, who is responsible for paying the costs of the medical treatment incurred by the felony suspect who was wounded by Revere police officers. WLF's concern, however, is with the broader public interest issues arising out of these particular facts. The Foundation submits that the Supreme Judicial Court's decision should be overturned in the interests of clarifying Eighth Amendment principles, and to limit judicial law-making.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the recitation of facts as presented by the Supreme Judicial Court of Massachusetts in *Massachusetts General Hospital v. City of Revere*, 434 N.E.2d 185, 185-86 (1982). However, in order for the constitutional issues presented by this case to be viewed in their proper context, *amicus* wishes to stress the following.

The felony suspect in question, Patrick M. Kivlin (Kivlin), was wounded by a Revere police officer as he attempted to flee from the scene of an attempted house break-in. The police thereafter summoned an ambulance and Kivlin was taken to the emergency room at Massachusetts General Hospital (MGH). There, Kivlin received immediate and proper medical treatment for his gunshot wound and was released. Whatever right he had to receive medical care was thus effectively preserved at this point.

There is no indication in the record that Kivlin was indigent or unable to pay for the costs MGH incurred in treating his wound. Nevertheless, MGH chose not to sue Kivlin in a civil action to recover its medical fees. Indeed, MGH did not even take the time to send Kivlin a bill for its services. MGH's reaction was to send the bill directly to the City of Revere (via its Police Department) and, later, to sue the City when it refused to pay.

Nothing also is known about how Kivlin views the present suit. Certainly, there is no indication in the record to suggest that he even remotely believes that his Eighth Amendment rights were violated by the City. MGH's suit was apparently instituted without his consent and, quite possibly, without his knowledge. In this regard, respondent's own characterization of its suit as a "collection case" (Respondent's Brief in Opposition to Petition at 2), rather than a constitutional one is revealing.

SUMMARY OF ARGUMENT

The Supreme Judicial Court of Massachusetts clearly erred by holding that a municipality has a constitutional duty, arising under the Eighth Amendment, to pay for medical services rendered to a felony suspect injured while being apprehended by the police. The court thus erroneously ruled that a person has been unconstitutionally inflicted with cruel and unusual punishment by the mere refusal of the city to pay for such medical services rendered, apparently regardless of (1) the cost of such services, (2) whether the person could pay for the services he received, and (3) whether the person even knew, let alone cared, that he was being so inflicted with this allegedly cruel and unusual punishment.

MGH argues that Kivlin's right to medical care would be jeopardized if Revere did not pay for his hospital bills. The fact remains, however, that Kivlin *did* receive proper medical care and there is no suggestion that such care will not be forthcoming in the future for other persons in need who are arrested by the police.

This novel and, frankly, absurd decision, totally misinterprets basic Eighth Amendment jurisprudence, ignores the law of standing, and intrudes into an area best left to the legislative branches of government. For these reasons, *amicus* submits that the decision is contrary to the public interest and should be summarily reversed.

ARGUMENT

I. THE EIGHTH AMENDMENT'S PROHIBITION AGAINST "CRUEL AND UNUSUAL PUNISHMENTS" DOES NOT GOVERN TREATMENT OF CRIMINAL SUSPECTS PRIOR TO CONVICTION.

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The constitutional history of the "cruel and unusual punishment" clause is well known to this Court. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976). Rather than give a lengthy account of that history here, it suffices to note that the primary concern of the drafters was to proscribe torture and other methods of punishment then deemed to be barbarous. *See* Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 842 (1969). Over the years, this Court has gradually broadened the protections afforded under the "cruel and unusual punishments" prohibition in accordance with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In every case in which this Court has had occasion to interpret the meaning of the Amendment's prohibition, however, it has done so by beginning with the elementary principle that the Amendment proscribes physically unnecessary or barbarous punishments, and that punishment can be imposed only after a criminal conviction has been secured. As this Court noted in *Ingraham v. Wright*, 430 U.S. 651, 664 (1977):

> The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bails, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to *limit the power* of those entrusted with the criminal-law function of govern-

> ment. *An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.* We adhere to this longstanding limitation . . . . (emphasis added).

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court broadened the scope of the Eighth Amendment's prohibition against cruel and unusual punishment to include a prohibition against the deliberate indifference by prison personnel to a prisoner's serious illness or injury. However, this Court made it clear that the right to such medical care applies only to those individuals who are being punished by incarceration and are therefore presumably unable to obtain care for themselves:

> [T]he government's obligation [under the Eighth Amendment is] to provide medical care for those whom it is *punishing* by incarceration. *An inmate* must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death". . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

Id. at 103 (citations omitted) (emphasis added).

The "longstanding limitation" on the application of the Eighth Amendment is clear. The Eighth Amendment applies only *after* the government has secured a criminal conviction. At that point the government is limited as to the types of punishment it may constitutionally inflict.

Where, as in the present case, there had been no formal adjudication of guilt, the state is without the power to punish. Consequently, the Eighth Amendment's prohibition against "cruel and unusual punishments" is inapplicable to persons such as Kivlin. Rather, it is the Due Process Clause of the Fourteenth Amendment that gov-

erns the rights of persons in official custody prior to criminal conviction, or in a noncriminal context. *Ingraham v. Wright*, 430 U.S. at 671, n.40. In this case, the Supreme Judicial Court of Massachusetts has thus not only ignored this longstanding limitation on the applicability of the Eighth Amendment, but it has misused this Court's holding in *Estelle v. Gamble* to blur the carefully crafted distinction established by the Court to govern pre- and post-trial deprivations of liberty.

The respondent further argues that "[i]t would be anomalous indeed if *un*convicted prisoners had fewer rights and if the government had fewer obligations with respect to them" than convicted prisoners. Brief for Respondent in Opposition to Petition at 4. Yet this same argument was made and rejected in *Ingraham v. Wright*:

> [P]etitioners contend that extension of the prohibition against cruel punishments [to a noncustodial, schoolroom setting] is necessary lest we afford greater protection to criminals than school children. It would be anomalous, they say, if school children could be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment. Whatever force this logic may have in other settings, we find it an inadequate basis for wrenching the Eighth Amendment from its historical context. . . .

Id. at 668-69 (footnotes and citations omitted).[2]

In *Ingraham*, the Court went further to note that the children who were disciplined were not left without a remedy. Although an action based upon the provisions of the Eighth Amendment was foreclosed to them, tradi-

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[2] This is not to say, however, that *amicus* necessarily agrees with prior court decisions expanding the rights of criminals and prisoners, which, in some respects, is greater than that afforded to the victim and law-abiding citizens.

tional tort actions were still available. In this case, the remedy is more substantial than that in *Ingraham*. Under Massachusetts law, a patient is entitled to receive proper emergency medical treatment without regard to his or her financial status. *See* Mass. Gen. Laws Ann. c.111, § 70E (West 1982). Also, federal programs such as the Hill-Burton Act provide funding for hospitals such as MGH to ensure medical treatment for indigents. 42 U.S.C. § 291 *et seq.* *See also* Dougherty and Dougherty, *Moral Reconstruction on the Hospitals: A Legal and Philosophical Perspective on Patient Rights*, 14 Creighton L. Rev. 1409, 1410-1411 (1981). Significantly, there is no suggestion made by the hospital that they would in the future refuse to treat arrestees like Kivlin if the City did not pay the bills.

II. ASSUMING, *ARGUENDO*, THAT THE EIGHTH AMENDMENT IS APPLICABLE BEFORE CONVICTION, NO CRUEL AND UNUSUAL PUNISHMENT WAS INFLICTED IN THIS CASE.

Even if the Supreme Judicial Court were correct in deciding that the Eighth Amendment is applicable before conviction and is triggered the moment a person is in custody, 434 N.E.2d at 189, *amicus* submits that, in any event, no cruel and unusual punishment was inflicted on anyone in this case. The fact is that the suspected felon, Kivlin, was provided prompt and proper medical treatment. He was not deprived of any rights, including medical treatment. That fact should have ended the Eighth Amendment inquiry right there.

But since the lower court nevertheless ruled that Kivlin's Eighth Amendment rights were infringed, one must necessarily conclude that the cruel and unusual punishment allegedly inflicted was the mere refusal of the City of Revere to pay for Kivlin's medical services. *Amicus* submits that this does not amount to the infliction of cruel and unusual punishment.

An analysis of the Court's conclusion leads to some fairly absurd propositions. For example, the Court's conclusion suggests that Kivlin's "cruel and unusual punishment" was his knowledge that the City was not paying his medical bills. And since we do not even know that Kivlin was aware that the City refused to pay for his medical services, it is quite possible that the punishment being allegedly inflicted was so "cruel and unusual" that Kivlin was in fact not even aware he was being so punished!

When did this alleged punishment begin and when did it end? Under the lower court's analysis, one must conclude that it began the day that the City of Revere wrote to the hospital and exhibited a "deliberate indifference" by refusing to pay for Kivlin's medical treatment. The "punishment" thus appears to be a continuous one that will abate when the City either agrees to pay the bill or actually pays it. But since the bill was not sent by the hospital to the City until October 18, *after* Kivlin was released from the hospital and *after* being released from police custody on his personal recognizance, then the punishment—the City's refusal to pay—was *not* inflicted while Kivlin was in custody. And since the lower court's analysis for refusing to hold the City liable for the cost of Kivlin's *second* treatment by the hospital in October was because Kivlin was "no longer in custody of the Revere police," 434 N.E.2d at 189, that reasoning thus applies as well to his first stay.

In addition, the lower court's conclusion necessarily means that "cruel and unusual punishment" is inflicted regardless of the cost or who provides the medical services. Thus, if Kivlin had instead suffered a bruised arm from a police nightstick requiring nominal, though necessary, medical treatment, would the City have inflicted "cruel and unusual punishment" by refusing to pay a bill for $35.00 sent by the hospital? Or what if the City had a policy of paying only half of the bill; or 75 percent; or

95 percent? Or what if a citizen experienced in first aid had voluntarily provided care to the wounded suspect at the scene and sent a bill to the City for services rendered? Indeed, even if Kivlin or a third party had paid the bill in full, and even insisted on doing so, the lower court's conclusion would still mean that "cruel and unusual punishment" was inflicted by the mere fact that the taxpayers did *not* pay it. Presumably, under the court's decision, the city would even have to pay if the suspect in custody were wounded by his co-felon instead of the police.

As is readily evident, *amicus* submits that this decision makes for bad law.

III. THE TASK OF DETERMINING WHO SHOULD PAY FOR THE MEDICAL CARE AFFORDED A CRIMINAL SUSPECT IS A LEGISLATIVE, NOT A JUDICIAL, FUNCTION.

Amicus submits that the holding below constitutes a serious threat to the concept of "separation of powers" that has formed the basis of our system of government. This Court has recognized that certain activities are more appropriate to one branch of government than the other. *E.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (executive branch in foreign affairs); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (judicial branch to review law); *Furman v. Georgia*, 408 U.S. 232 (1972) (legislative branch to make law and set policy). Although there may be some small overlapping of function, each branch must be careful not to encroach on the other's responsibility.

The Supreme Judicial Court's opinion in *amicus*' view manifests a "deliberate indifference" to the responsibilities and authority of the legislative branch of government. Although various local, state and federal laws are in place governing how scarce financial resources are to be allotted so as to pay for emergency medical care of indigents, the lower court wishes to construe the provi-

sions of the Eighth Amendment so as to make it possible for a court to decide how public funds are spent in these types of situations.

The Supreme Judicial Court wishes to have municipalities, in this case the City of Revere, be responsible for paying for the medical fees of injured felony suspects rather than the suspect himself or the hospital which provides the medical care. The solution it has devised may or may not be thought to be a wise one.[3] That is beside the point. What we have here is nothing less than an effort by a court *to legislate* a specific result which it deems to be proper.

The Eighth Amendment is a *limitation* on the powers of government. It prohibits the government from setting excessive bails and fines and imposing cruel or unusual punishment. It is judicial activism of the highest order to read into this limiting provision an *affirmative* duty to pay for the medical care of felony suspects and to determine the appropriate administrative institution or political entity that will henceforth be responsible for making these payments.

For this Court to uphold the intrusion into the legislative domain countenanced by the court below would be to sanction judicial usurpation of power of a magnitude rarely seen before. An affirmance of the decision would

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[3] *Amicus* believes that the lower court's decision is not in the public interest for many reasons, including the possibility that it will lead to an increase in criminal activity. Criminal activity, especially the kind that was afoot here, is an economic enterprise. To most criminals, the expected benefits from crime exceed the associated costs or risks. The risk of apprehension is small, the likelihood of a conviction smaller, and the probability of incarceration almost nonexistent. In short, "crime does pay." *See* North and Miller, THE ECONOMICS OF PUBLIC ISSUES 163 (1980).

What the lower court has done is to lower the cost a little further to the criminal of "doing business" by providing him with a form of publicly financed disability insurance for injuries suffered on the job.

send a dangerous signal to other judicially active judges and lawyers to further "judicialize" legislative problems under the guise of constitutional interpretation, until a point is reached where "government by judiciary" will become more entrenched than it already appears to be.

IV. A HOSPITAL WHICH HAS PROVIDED MEDICAL CARE TO A PERSON IN POLICE CUSTODY DOES NOT HAVE STANDING TO RAISE THAT PERSON'S CONSTITUTIONAL RIGHT WHEN THAT RIGHT HAS NOT BEEN THREATENED AND HE WOULD HAVE NO DIFFICULTY IN ASSERTING THE RIGHT HIMSELF.

An examination of the allegations made by respondent demonstrates that MGH lacks standing to maintain this suit. The lower court recognized that "there may be a question as to the hospital's standing to raise a claim under the Eighth Amendment in this context," *Massachusetts General Hospital v. City of Revere*, 434 N.E.2d at 188 n.7, but resolved the standing question by citing *Barrows v. Jackson*, 346 U.S. 249 (1953).

The resolution of the standing question by the lower court makes its discussion proper on appeal to this court. The Supreme Judicial Court of Massachusetts has ignored the clear principles of third party standing enunciated in *Barrows*.

In *Barrows v. Jackson*, this Court carved out an exception to the normal requirement of "injury" to establish standing in order to allow third party standing when "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Id.* at 257. As authority, *Barrows* can easily be distinguished from the instant case because *Barrows* represents a situation in which it was all but impossible for the true holder of the constitutional right in question to bring an action to assert that right.

But here, there is no showing that Kivlin was unable to enforce his Eighth Amendment rights. Assuming, *arguendo*, that the Eighth Amendment compels a municipality to reimburse a hospital for medical treatment provided to an injured suspect, there is no genuine obstacle, such as mootness, to deter him from asserting his right personally. Kivlin never chose to sue petitioners, ostensibly because he never felt his right to medical care was endangered nor was he given a bill for the services. Nor does it appear likely, considering current statutory safeguards, that future arrestees' right to treatment will be endangered.

To grant third party standing to respondent will serve only to "protect" its right to uncollected medical fees. Such a grant will also contradict the Court's own policies against third party standing in that a future injured suspect will enjoy his alleged right to medical care regardless of whether the hospital wins a future lawsuit for reimbursement of the costs of his medical care.

Amicus suggests that although Petitioner lacks standing, this Court should nevertheless rule against Petitioner on the merits since "the merits of this controversy present a pure question of law, with no need of a hearing for fact development, [and] because these merits are so clearly against the parties asserting jurisdiction." *Edwards v. Carter*, 580 F.2d 1055, 1056-57 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978). *See Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978); *Philbrook v. Glodgett*, 421 U.S. 707, 720 (1975). If the Court dismisses this case only on the issue of standing, it is likely that Kivlin or some other injured suspect will renew this litigation only to further clog up this Court's already overcrowded docket. Accordingly, the Court should reverse the lower court on the merits.

CONCLUSION

Amicus submits that the lower court seriously erred in ruling that the Eighth Amendment's proscription against the infliction of "cruel and unusual punishments" requires a municipality to pay for medical services rendered to a person injured while being apprehended for suspected criminal activity. The lower court also displayed a "deliberate indifference" to the role and authority of the legislative branches of our government by engaging in a prime example of judicial activism. And while the lower court also misconstrued the law of third party standing, *amicus* submits that this Court can and should summarily reverse on the merits without the need for scheduling oral argument.

Respectfully submitted,

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